

No. 20,448

In the United States Court of Appeals
for the Ninth Circuit

REUBEN G. LENSKE, APPELLANT

v.

FEB 14 1967

UNITED STATES OF AMERICA, APPELLEE

On Appeal From the United States District Court
for the District of Oregon

BRIEF OF THE APPELLEE

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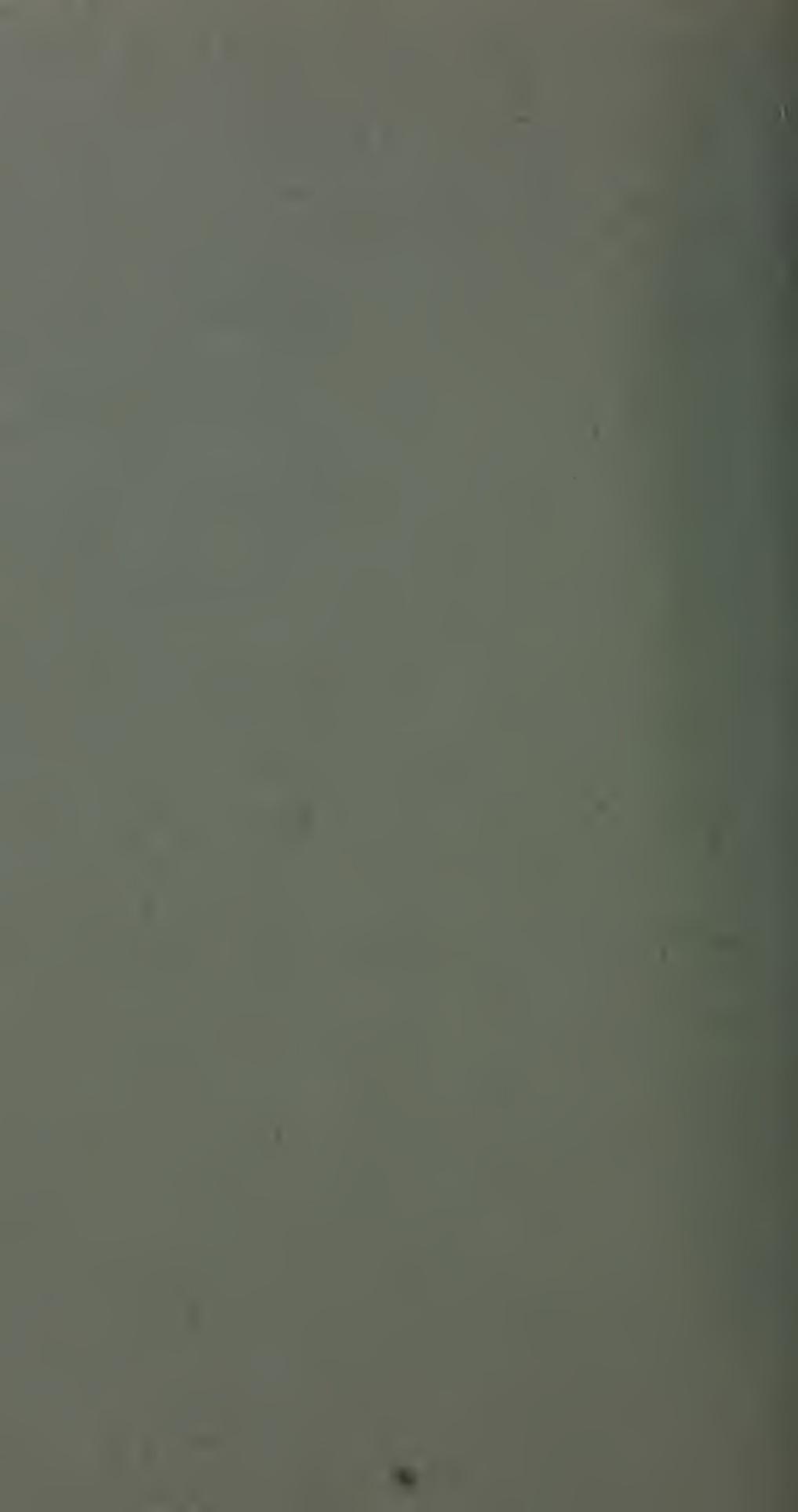


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BRIEF OF THE APPELLEE

OPINIONS BELOW

The order of the district court denying the defendant's motion for a new trial and the order denying the defendant's motion to disqualify the trial judge (S.R. 88)¹ on the remand directed by this Court, are not reported.

¹ References to the District Court Clerk's Transcript of Record in this proceeding numbered 20,448 are designated, "S.R.". Record References to the pending appeal from the judgment of conviction in No. 19,539 are designated, "R".

There was no opinion below on the judgment convicting the defendant of tax evasion and of wilfully subscribing to a false income tax return under penalties of perjury which appears on page 1135 of the District Court Clerk's Transcript of Record in No. 19,539. The Court made detailed findings of fact and conclusions of law which appear in the District Court Clerk's Transcript of Record at pages R. 1107-1134.

JURISDICTION

The orders of the court below denying the defendant's motion to disqualify the trial judge and for a new trial on the grounds of newly discovered evidence, were entered on August 13, 1965 (S.R. 88, 126). A notice of appeal from the denial of the defendant's motion to disqualify the trial judge was filed in open court on August 13, 1965 and an amended notice of appeal filed on August 23, 1965 (S.R. 126-127). A notice of appeal from the denial of the defendant's motion for a new trial was also filed on August 23, 1965 (S.R. 127). The jurisdiction of this court is invoked under 28 U.S.C., Section 1291.

The defendant's appeal from the judgment below convicting him of tax evasion and of filing a false income tax return under penalties of perjury is pending before this court as No. 19,539 and was consolidated with the instant appeal by order of this court of April 26, 1965.

COUNTER-STATEMENT OF THE CASE

The evidence leading to the conviction of the defendant on April 22, 1964, for tax evasion and for

filng a false income tax return, after eight weeks of trial and over 350 witnesses, followed by a bench trial after the defendant was granted a mistrial on the death of the first trial judge, the Honorable John R. Ross (R. 1160), is discussed in the Government's brief in No. 19,539 pending before this court.

The evidence and record in the instant appeal may be summarized as follows:

1. Allegations of Bias and Prejudice

Over three months after the remand of this court for the "limited purpose of entertaining appellant's pending motion for a new trial" (April 26, 1965 Order) and after the defendant's motion for a new trial was set down for hearing before the trial judge, the defendant filed a motion seeking an order that his motion for a new trial be heard by a judge other than the trial judge (S.R. 59, 81). The defendant filed a thirteen page affidavit of prejudice purporting to show that the trial judge was prejudiced against him (S.R. 61-73). In his affidavit the defendant makes allegations in the form of unsupported conclusions and opinions, laced with contumacious language, that go to the conduct and rulings of the Court during the trial below.

For the first ground of his motion (S.R. 61) the defendant, who had a net worth as of December 31, 1958 of \$343,821.46 (R. 1107), who did not file an affidavit of indigency, and who did not elect to proceed on appeal in forma pauperis, alleges that the trial judge sought to impede and obstruct his appeal by reason of the Court's request that the clerk's copy

of the transcript below not be filed on appeal until an order was entered settling questions arising out of the defendant's efforts to use the clerk's copy of the transcript without paying reporter's charges.

The defendant did not detail his second ground of alleged prejudice but merely adopts his brief filed in No. 19,539 and "all of my statements therein", as reflecting unspecified errors stemming from prejudice. (S.R. 63.)

The third basis of prejudice alleged by the defendant is directed toward the holding by the trial court after a hearing (R. 991-1003), as the late Judge Ross had earlier held after a hearing (R. 1152, 10/26/62 Tr.)² and again held after a second hearing (R. 1154), that the defendant consented to an examination of his records and copies made of these records were therefore admissible in evidence. The Court is respectfully referred to pages 59-64 and 83 of the Government brief in No. 19,539 where the detailed findings of the Court below (R. 991-1003) are discussed in some detail.

For a fourth ground of alleged prejudice the defendant has directed his allegations to the argument below where argument was heard by the Court for three full days (See 4/21/64 Tr. 2623-2624) and until midnight of the third day (2/26/64 Tr., 2/27/64

² References to the forty volumes of testimony at the first trial are designated by volume and page number, e.g., Vol. 1 p. 1; References to the volumes of testimony at the second trial are designated by date and by page as is the transcript of the hearing below on the defendant's motion for a new trial, e.g. 8/13/65 Tr. 1.

Tr. and 2/28/64 Tr. Vols. A, B, and C). At approximately 11:00 on the evening of the third day of argument (2/28/64 Tr. 2608), the defendant sought an "indefinite time" (2/28/64 Tr. 2590) to continue his counsel's completed argument on intent. The Court, commenting that it was not particularly seemly for the defendant to argue his own intent and pointing out that the defendant's counsel had just argued the case (2/28/64 Tr. 2590), granted the defendant an additional thirty minutes for argument—which the defendant used (2/28/64 Tr. 2589-2607). In his affidavit of prejudice, the defendant alleges that the trial judge resented his desire to argue his own case and did not want to hear him "to as much as an extent as possible" (S.R. 63-64).

The defendant's fifth ground for alleging prejudice is directed to the hearing held on the defendant's first motion for a new trial where the trial judge permitted the defendant to argue from 9:00 a.m. until 4:45 p.m. on April 21, 1964, with both the defendant and his counsel continuing the argument the next day (4/21/64 Tr. 4/22/64 Tr.). The defendant alleges in his affidavit (S.R. 64) that the trial judge was unwilling to hear him out fully.

The remaining allegations in the defendant's affidavit are directed to his disagreement with rulings of the Court below on his claimed depreciation allowance (S.R. 64-70), on the Obye-Durkin transaction (S.R. 70), the Eleanor Bertrand Account Receivable (S.R. 71) and an unspecified item designated only as "a 1959 transaction" (S.R. 73), followed by an allegation that the trial judge shifted the burden of proof

(S.R. 73). The evidence on the rulings of the Court is treated in the Government Brief in No. 19,539 and in the argument section of this brief.

2. Record of Brady Documents

The defendant filed his own affidavit as the sole support for that portion of his motion relating to documents taken by one John Brady (S.R. 31). In his affidavit the defendant alleged that he ascertained, "as a result of depositions that I took of John M. Brady, Norman Phifer and George Nyman", agents of the Internal Revenue Service, that John Brady stole numerous documents from the defendant's office which Brady turned over to the agents of the Internal Revenue Service who retained possession of the "documents and/or photostatic copies thereof and/or micro-film thereof" in violation of defendant's rights, and that, "the inspection of said records was essential in the preparation of the defendant's defense." (S.R. 31.)

The evidence and record supporting the ruling below as developed in the same depositions taken by the defendant of John M. Brady, Norman H. Phifer, Chief, Field Audit Branch, Internal Revenue Service, and Revenue Agent Nyman and the affidavit and deposition of Special Agent Albert Deschenes, are as follows:

John M. Brady formerly worked for the defendant. Sometime in 1960 when he was still working for the defendant, Brady took a number of the defendant's documents that were on a table in the library of the defendant's office. Brady never told anyone that he

was going to take the documents. He specifically testified that no one in the employ of the United States suggested that he take these documents and that he voluntarily took the documents on his own without the knowledge of assistance of anyone in the employ of the United States (Brady, Ex. C, pp. 113, et seq.).

On or about November 10, 1960, Brady made an unsolicited visit to the office of Norman Phifer, Chief, Field Audit Branch, Internal Revenue Service, and told him that he had the documents. This was the first time Phifer heard of the documents. Phifer talked to Brady for about five minutes and arranged for Brady to meet with representatives of the Intelligence Section (Brady Dep., Ex. C, pp. 115-116; S.R. 46).³ The meeting was held the same day and was attended by, among others, the Chief of Intelligence, Jack Savage, Special Agent Deschenes, and Revenue Agent Nyman. Brady had not discussed the defendant's affairs with any employee of the United States prior to his meeting with Phifer (Brady Dep., Ex. C, pp. 116-117; Nyman Dep., Ex. A, pp. 32-34; Deschenes Affidavit, R. 48; Deschenes Dep., Ex. E, p. 11). At the meeting Brady displayed the documents he had taken from the defendant's office and all of the documents were returned to Brady the same day (Deschenes Affidavit, R. 49; Deschenes Dep., Ex. E, pp. 12-16; Brady Dep., Ex. C, p. 121). Brady then made a microfilm of the documents and turned it over to

³ Exhibits admitted at the hearing on the defendant's motion for a new trial were designated by letter (e.g. Exhibit A) and are listed in the District Court's transcript of Record at page 126.

the Internal Revenue Service (Deschenes Affidavit, R. 48-49). He "tore (the originals) up and threw them in the garbage can and that was the end of it" (Brady Dep., Ex. C, pp. 120-121).

Subsequent to this meeting Brady displayed a number of additional documents to Special Agent Deschenes on December 9, 1960 which Brady had also obtained on his own without any aid or suggestion from any employee of the United States (Brady Dep., Ex. C, pp. 113 et seq.; Deschenes Affidavit, R. 49; Deschenes Dep., Ex. E, p. 10). After examining the documents and determining that they were of no value to the investigation, Deschenes returned the documents to Brady within a month after receiving them (Brady Dep., Ex. C, p. 125; Deschenes R. 49; Deschenes Dep., Ex. E, pp. 19-22). The Internal Revenue Service has never had copies or microfilm of these documents (*ibid*). On January 10, 1961, Brady gave Deschenes a photocopy of a 1960 timber transaction (Ex. F.; Deschenes Dep., Ex. E, p. 23).

Brady was told by Special Agent Deschenes that none of the documents he had displayed were of any value to the investigation and Brady's claim for a reward was rejected (Brady Dep., Ex. C, pp. 125-126). The agents had previously obtained from third parties, and from data on the defendant's checks, the information in the documents displayed by Brady. None of the documents were introduced in evidence or used by the Government for leads, or in any other way (Nyman, Ex. A, Dep. p. 35; Deschenes Affidavit, R. 49; Deschenes Dep., Ex. E).

At the hearing below the defendant sought to take the oral testimony of John Brady, Special Agent Deschenes and Revenue Agent Nyman. The defendant made an offer of proof that was limited to an offer to show that John Brady was an informant for the Internal Revenue Service, and that Special Agent Deschenes and Revenue Agent Nyman had the documents taken by John Brady, a microfilm of the documents, and a 1960 timber agreement, when the agents filed affidavits in 1962 stating that they had no documents of the defendant in their possession. The defendant made no showing and no offer of proof as to how he was prejudiced by the taking of his documents and the Court sustained the objection to the taking of oral testimony (8/25/63 Tr. 81-82, 91-92).

The defendant saw the microfilm of the documents, and a print of the microfilm, prior to filing his affidavit below and prior to the hearing below (S.R. 31-32, Ex. A, pp. 29-30, 8/13/65 Tr.). The defendant was also told about the photocopy of the 1960 timber agreement almost four months prior to the hearing below and he did not even ask for a copy (Deschenes Dep., on 4/28/65, Ex. E, p. 23).

In his affidavit, and at the hearing below, the defendant did not point to a single instance, either by allegation, offer of proof, or otherwise, where any of the documents taken by Brady were used by the Government or would have been helpful in the preparation of his defense (S.R. 31, 47; 8/13/65 Tr. 77-92).

3. Net Worth Items

The defendant alleges in his motion for a new trial (S.R. 1-41) and sets forth in his brief (Defs. Br. p.

6) some ten transactions in support of his motion for a new trial. The evidence in support of the denial of the defendant's motion is discussed in Point III of the argument section of this brief.

SUMMARY OF ARGUMENT

I

A. There was no prejudice below. The trial judge gave the defendant all of his rights, supplemented them with extraordinary privileges such as an adjournment at the conclusion of the trial for the sole purpose of giving the defense an opportunity to seek further evidence to support its case, and heard the defendant both from the witness stand, and in argument, time and time again, such that the defendant's only real complaint is that the trial judge gave recognition to the principle that "impartiality is not gullibility".

B. The trial judge clearly had authority in the first instance to pass upon the sufficiency of the defendant's affidavit of bias and prejudice and did not cease to have power to entertain the defendant's motion for a new trial by virtue of the fact that the defendant filed a notice of appeal from the denial of his motion to disqualify the trial judge.

II

No error was committed below when the trial judge did not hear oral testimony on the taking of the defendant's documents by an employee of the defendant.

A. The defendant has no standing to complain here of undesignated portions of depositions admitted in their entirety as exhibits below where the depositions were relied on by the defendant and where the defendant did not by objection, motion to strike, or otherwise, designate those portions of the depositions to which he now objects—and has yet to designate.

B. No conflict of a material fact was developed below but even if there had been a conflict the rule is well established that a motion for a new trial based on newly discovered evidence may be decided without live testimony.

C. It is eminently clear on the record below that no useful purpose would have been served by the taking of oral testimony. First, the defendant's documents were taken and turned over to the Internal Revenue Service for examination by the defendant's then employee, John Brady, who acted on his own without the assistance, suggestion, or knowledge, of anyone in the employ of the United States. The documents in question were not introduced into evidence below and were not used by the Government, either as leads or otherwise, but even if they had been used by the Government it has long been established that there is no violation of rights secured by the Fourth and Fifth Amendment to the United States Constitution where, as here, a private person acting on his own takes the documents of another and turns them over to Government representatives. Second, the defendant made an offer of proof below but his offer was limited to a showing that John Brady was an informant for the

Internal Revenue Service who made it a practice to bring stolen documents to the Internal Revenue Service, and that Internal Revenue Service Agents Deschenes and Nyman had the documents taken by John Brady, a microfilm of the documents, and a photocopy of a 1960 timber agreement when the agents filed affidavits in 1962 stating that they had no documents of the defendant in their possession. As pointed out above, Brady took the documents on his own and, except for a photocopy of a 1960 timber agreement, Deschenes returned all of the documents to Brady well over a year prior to the filing of his affidavit, retaining only an unprinted microfilm of the documents. The photocopy pertains to a 1960 transaction and has yet to be shown as material, which is an express requirement of Rule 16 of the Federal Rules of Criminal Procedure pursuant to which Deschenes' affidavit was filed, and has no bearing on this case. The defendant, who had seen the microfilm, and a print of the microfilm, almost seven months before the hearing below, did not offer to prove below and has yet to point to a single instance where any of the documents in question were used by the Government or would have been helpful in the preparation of his defense.

III

It is well settled that a motion for a new trial on the ground of newly discovered evidence is addressed to the District Court's discretion, the exercise of which, in the absence of abuse, is not reviewable. There was no abuse of discretion below but there would have been if the Court had granted the defend-

ant a new trial on the basis of nothing more than a rehash of the trial and the submission of material that the defendant elected not to present at the trial.

ARGUMENT

I. There Was no Prejudice Below Where the Trial Judge not Only Granted the Defendant all of His Rights, But Supplemented Them by Extraordinary Privileges, and the Attack on the Jurisdiction of the Trial Judge Is Frivolous

1. At the trial below the trial judge permitted the defendant to testify at will—a privilege the defendant exercised to the hilt (Lenske, 7/14/63 Tr. pp. 743-864; 7/15/63 Tr. pp. 867-1027; 7/16/63 Tr. pp. 1036-1158; 7/17/63 Tr. pp. 1239-1270; 7/20/63 Tr. pp. 1582-1587; 8/15/63 Tr. pp. 1655-1762; 8/16/63 Tr. pp. 1876-1893).

After the Government had concluded its case in chief, after the defense had concluded its case, after rebuttal, or, in short, when the trial was over, the defense asked for, and was granted by the trial judge, the extraordinary privilege of an 11 day adjournment to seek further evidence to support its case (7/29/63 Tr. 1598-1607.). Trial was thereafter had for two full, nine to five fifteen, days (8/15/63 and 8/16/63 Tr.). Both sides then submitted extensive briefs (R. 407-794) and oral argument was thereafter heard for three days, with the last session going until midnight (2/26/64 Tr., 2/27/64 Tr., 2/28/64 Tr., Vols. A, B and C). The trial judge also heard argument for over a day, almost exclusively by the defendant, on the defendant's first motion for a new trial (4/21/64

Tr., 4/22/64 Tr. 2788-2844). It is in this framework that the defendant complains of not being heard "to as much an extent as possible" (S.R. 64, line 2).

2. The affidavit of prejudice filed by the defendant is without substance, and admittedly so, as shown by the defendant's admission during the argument below that the "cases are clear that the bias or prejudice charged must be a personal bias and not a bias growing out of rulings in the case" (8/13/65 Tr. 2-3). In this much the defendant was correct and he thereby conceded his ill conceived charge of prejudice grounded on unsupported conclusions concerning the rulings of the trial judge *Berger v. United States*, 255 U.S. 22, 31, *Ex. Parte American Steel Barrel Company*, 230 U.S. 35, 43, *Chessman v. Teets*, 239 F.2d 205, 215 (C.A. 9th) reversed on other grounds, 354 U.S. 156; *Willenbring v. United States*, 306 F.2d 944 (C.A. 9th).

3. At the hearing set down to hear the defendant's motion for a new trial the Court first heard the defendant's motion to disqualify the trial judge. Immediately following the denial of his motion the defendant filed a notice of appeal from that order in open Court. After contending that the notice of appeal deprived the Court of jurisdiction, the defendant proceeded to argue his motion for a new trial (8/13/65 Tr. 14-16). The defendant has pointed to no authority for his frivolous contention (Defs. Br. pp. 7-12) that the trial judge was deprived of jurisdiction and committed error by entertaining the defendant's motion for a new trial after the defendant

filed a notice of appeal from the denial of his motion to disqualify the trial judge. The trial judge clearly had authority in the first instance to pass upon the sufficiency of the defendant's affidavit, *Taylor v. United States*, 179 F.2d 640, 644 (C.A. 9th) and cases cited, and did not cease to have power to act by virtue of the defendant's transparent and untimely (28 U.S.C., Sec. 144) attempt to obstruct and pervert orderly judicial procedures, *Ex Parte American Steel Barrell Co.*, 230 U.S. 35, 43, *In Re Union Leader Corporation*, 292 F.2d 381, 383 (C.A. 1st), certiorari denied 368 U.S. 927, *United States v. Hetherington*, 279 F.2d 796 (C.A. 7th), certiorari denied 364 U.S. 908.

In the final analysis the defendant has sought to create prejudice where there was none. The defendant is in no position to complain because the trial judge gave recognition below to the principal that "impartiality is not gullibility," *In Re J. P. Linahan*, 138 F.2d 650, 654 (C.A. 2d).

II. No Error Was Committed Below When the Trial Judge, After the Defendant Had Failed to Make a Meaningful Offer of Proof, Did Not Take Live Testimony on the Taking of the Defendant's Documents by an Employee of the Defendant.

1. The defendant has designated a series of alleged errors below which go to the failure of the trial judge to take live testimony on that portion of the defendant's motion relating to the taking of his documents by his then employee, John M. Brady (Defs. Br., Specifications of Errors Nos. 3-8). In support of his motion, the defendant filed his own affidavit which was expressly grounded on depositions taken by the

defendant of John M. Brady, Norman Phifer, Chief, Field Audit Branch, Internal Revenue Service and Revenue Agent George Nyman (S.R. 31). The Government filed its opposition to the defendant's motion which was based on the same depositions taken by the defendant and the affidavit of Special Agent Albert P. Deschenes (S.R. 45-47). The defendant thereafter took a second deposition of Revenue Agent Nyman and John M. Brady while the Government took the deposition of Albert P. Deschenes, which was attended by the defendant who cross examined Deschenes. The depositions were relied on by the defendant in the first instance (S.R. 31, 85-86) and admitted as exhibits to the hearing below on the motion of the Government (Exs. A-E, 8/13/65 Tr. 81, 89). Although the defendant did not move to strike any portion of the depositions when they were admitted below (*ibid*), the defendant now argues (Defs. Br. p. 27) that it was an "abuse of discretion" to admit the complete depositions because portions of the depositions, not designated by the defendant below and not designated here, contain prejudicial and irrelevant matter. This is idle argument and even if there had been any error it was "waived by the defendant's failure to preserve the alleged error for review," *United States v. Vanover*, 339 F.2d 987 (C.A. 9th), *United States v. Bush*, 267 F.2d 483, 488 (C.A. 9th), *Duke v. United States*, 255 F.2d 721, 727 (C.A. 9th), certiorari denied, 357 U.S. 920.

2. No conflict of a material fact was developed in the depositions where the defendant sought and failed to find support for his allegations. But even if there

had been a conflict the rule is well established that a motion for a new trial based on newly discovered evidence may be decided without live testimony, *United States v. Johnson*, 327 U.S. 106, 111-113; *Hillman v. U.S.*, 192 F.2d 264, 272 (C.A. 9th), certiorari denied, 225 U.S. 699; *Ewing v. United States*, 135 F.2d 633, 637-638 (C.A. D.C.), certiorari denied, 318 U.S. 776; *United States v. Troche*, 213 F.2d 401, 403 (C.A. 2d.).

3. It is eminently clear on the record below that no useful purpose would have been served by the taking of oral testimony. Thus, the defendant basically offered to prove only two points on the Brady documents in his offer of proof below: (1) that John Brady was an informant for the Internal Revenue Service, known to be such by the agents, and that it had been the practice of Brady to bring stolen documents to the Internal Revenue Service; and (2) that Agents Deschenes and Nyman had the documents taken by John Brady, a microfilm of the documents, and a photocopy of a timber agreement, when the agents filed affidavits in 1962 stating that they had no documents of the defendant in their possession (Defs. Br. pp. 29-30). The defendant sought to establish these points through oral testimony of John Brady and Revenue Agent Nyman, both of whose depositions had already been taken twice by the defendant (Exs. A, B, C, D) and Special Agent Deschenes who had also been previously examined by the defendant (Ex. E).

As to the first point, John Brady admitted taking the defendant's documents but he specifically testified

when his deposition was taken by the defendant: that no one in the employ of the United States even suggested that he take the documents which he voluntarily took without the knowledge or assistance of anyone in the employ of the United States (Brady Dep. Ex. C, pp. 113, et seq. 116-117); that he made an unsolicited visit to the Internal Revenue Service with the documents which were thereafter returned and he tore them up and threw them in the garbage can (*ibid*, pp. 115-116, 120-121, 125). Brady was told by Special Agent Deschenes that the documents he had displayed "were absolutely of no value" to the investigation of the defendant's tax matters and Brady's claim for a reward was rejected (*ibid*, pp. 122, 125-126). Revenue Agent Nyman, whose deposition was twice taken by the defendant, also testified that he did not assist, suggest, or even know that Brady had taken the defendant's documents until Brady produced the documents on his unsolicited visit to the Internal Revenue Service—which was the first time Nyman ever discussed the defendant's tax affairs with Brady (Nyman Dep. Ex. A, pp. 32-38). To the same effect see the affidavit (S.R. 48) and deposition (Ex. E, pp. 12-14, 19, 22-23) of Special Agent Deschenes. In short, the defendant failed to make a showing that any representative of the United States had any connection whatsoever with the taking of his documents by his former employee.

The documents in question were not introduced into evidence below and were not used by the Government either as leads or otherwise (R. 47-49, Nyman Dep., Ex. A, p. 35). But even if they had been, it has

long been established that there is no violation of rights secured by the Fourth and Fifth Amendments to the United States Constitution where, as here, a private person acting on his own, without any assistance from Government representatives, takes the documents of another and turns them over to Government representatives, *Burdeau v. McDowell*, 256, U.S. 465, 476, and Cf. *United States v. Goldberg*, 330 F.2d 30 (C.A. 3d).

As to the second point, the defendant has scrupulously avoided any discussion in his brief relating these documents to the requirements for a new trial. This was also the case below (8/13/65 Tr.) and the defendant would now seek solace out of the denial by the Court below of the defendant's request to take oral testimony. But when the defendant made an offer of proof below his only offer that touched upon the documents taken by John Brady was that he would show that John Brady was an informant for the Internal Revenue Service and that Internal Revenue Agents Deschenes and Nyman made false affidavits in September, 1962 when they stated that they did not have in their possession any documents belonging to the defendant (8/13/65 Tr. 77-91, Defs. Br. 31). As pointed out above, except for a photocopy of a 1960 timber agreement (Ex. F), Deschenes returned all of the documents to Brady well over a year prior to the filing of his affidavit (R. 44-45, S.R. 48-49, Brady Dep. Ex. D, p. 22; Deschenes Dep. Ex. E, pp. 16, 19-22), retaining only an unprinted microfilm of the documents (S.R. 48-49, Deschenes Dep., Ex. E, p. 17). The photocopy pertains to a 1960 timber trans-

action (Ex. F), has yet to be shown as material (which is an express requirement of Rule 16 of the Federal Rules of Criminal Procedure pursuant to which the Deschenes affidavit was filed), and has no bearing whatsoever on the instant case. It is noteworthy that, when the defendant was told about the photocopy some four months prior to the hearing below, he never even asked for a copy (Deschenes Dep., Ex. E, p. 23). It was the Government who made it a part of the record below. (8/13/65 Tr. p. 139; S.R. 126, 8/13/65, Order, Blotter Entry.) In this same vein, the microfilm and the print of the microfilm were made available to the defendant on January 27, 1965 (Nyman Dep., Ex. A, pp. 29-30, 39), approximately two weeks prior to the filing of the defendant's affidavit of February 12, 1965 (S.R. 31) and almost seven months prior to the hearing below on August 13, 1965. Significantly, the defendant did not even make the microfilm and the print of the microfilm a part of the record on this appeal.⁴ It is in this fashion that the defendant pretty much admits the total absence of any support for his bid for a new trial by his failure to allege facts below, make an offer of proof, or even discuss in his brief here, how the documents in question comprise evidence and, if they are evidence, how this evidence meets the requirements that to obtain a new trial the evidence must be, among

⁴ See the copy, lodged with the clerk, of the letter of October 5, 1965, from Government Counsel to the defendant suggesting that the defendant make the necessary arrangements if he wanted the microfilm and the print of the microfilm to be a part of the record on appeal.

other things, (A) more than merely cumulative or impeaching, (B) material to the issues involved, and (C) evidence that would probably produce an acquittal, *Gallegos v. United States*, 295 F.2d 879, 881 (C.A. 9th), certiorari denied, 368 U.S. 988; *Pitts. v. United States*, 263 F.2d 808, 810 (C.A. 9th), certiorari denied, 360 U.S. 919.

In short, the defendant has never offered to prove below and has yet to point to a single instance where any of the documents in question were used by the Government or would have been helpful in the preparation of his defense.

III. It Would Have Been an Abuse of Discretion if the Trial Judge Had Granted the Defendant a New Trial on the Basis of a Rehash of the Trial and Material That the Defendant Elected to not Present at the Trial.

It has long been settled that a motion for a new trial on the ground of newly discovered evidence "is addressed to the District Court's discretion, the exercise of which, in the absence of abuse, is not reviewable," *Naval v. U.S.*, 278 F.2d 611, 615 (C.A. 9th) and the host of cases cited; *Morgan v. United States*, 301 F.2d 272, 274 (C.A. 9th). Otherwise stated, the ruling of the trial court should remain undisturbed except for most extraordinary circumstances, *United States v. Johnson*, 327 U.S. 106, 111. It is equally well settled that before the motion may be granted five requirements must be met: (1) the evidence must be newly discovered after trial, (2) there must be diligence on the part of the movant, (3) the evidence must be more than merely cumulative or impeach-

ing, (4) the evidence must be material to the issues involved, and (5) the evidence must be such as would probably produce an acquittal, *Gallegos v. United States*, 295 F.2d 879, 881 (C.A. 9th) certiorari denied, 368 U.S. 988; *Pitts v. United States*, 263 F.2d 808, 810 (C.A. 9th), certiorari denied, 360 U.S. 919. Viewed in the light of these principals it is clear that the Court below was eminently correct in denying the defendant's motion.

In his brief, the defendant has mislabelled as newly discovered evidence the mass of material submitted in support of the series of transactions set forth in the defendant's brief at pages 43 through 73. This material is nothing more than a rehash of the trial and a poorly disguised effort to present material that the defendant elected (for a particularly interesting example see the discussion below on the Tarlow transaction) not to present at the trial. In each and every instance the transactions raised by the defendant were ventilated at the trial. Seven of the witnesses named by the defendant in his motion testified at the trial where they were examined on their transactions with the defendant. Moreover, each of these witnesses testified at the *first* trial and, with one exception, the defendant chose not to call them as witnesses at the second trial. These witnesses are:

<u>Witness</u>	<u>Transcript Reference</u>
1. Eleanor Bertrand	Vol. 15, pp. 112-127; 7/19/63 Tr. pp. 1489-1508
2. Margaret Doan	Vol. 18, p. 161-181
3. Richard D. Bennett	Vol. 22, pp. 120-122
4. O. G. Larson	Vol. 16, pp. 59-68
5. A. L. Prater	Vol. 7, pp. 12-89
6. W. K. Royal	Vol. 6, pp. 196-211
7. Rebecca Tarlow	Vol. 20, pp. 131-141

Eleanor Bertrand Accounts Receivable (Defs. Br. p. 43). The only one of the above witnesses the defendant chose to call at the second trial was Eleanor Bertrand who is a widow with two children and on whose home the defendant held a mortgage (7/20/63 Tr. 1501-1502). After hearing, and observing, and questioning, Mrs. Bertrand (7/20/63 Tr. 1489-1508) and comparing her testimony at the second trial with the testimony she gave at the first (Vol. 15 pp. 112-127), including testimony contrary to her previously sworn affidavit which Mrs. Bertrand had read before she signed (7/20/63 Tr. 1489-1491, 1501-1502, 1573-1574), the trial judge was unable to give any credence to her testimony (Finding 32, R. 1027, 7/20/63 Tr. 1063). In this connection see *Maldonado v. United States*, 325 F. 2d 295, 297 (C.A. 9th), and cases cited. For a discussion of other aspects of this transaction the Court is respectfully referred to the Government's Brief in No. 19,539 at pages 19-21.

Rebecca Tarlow Liability (Defs. Br. p. 68). An interesting example of the defendant's technique for

seeking a new trial is the Rebecca Tarlow liability only a selective portion of which is discussed by the defendant in his brief (Defs. Br. pp. 68-70). At the first trial below Mrs. Tarlow testified with respect to her affidavit reflecting the amounts owed to her by the defendant (Vol. 20, pp. 131-141): "Yes, that is correct because we went through these very thoroughly at the time." The defendant cross-examined Mrs. Tarlow himself and did not challenge her testimony (Vol. 20 p. 141). This all took place on March 21, 1963. At the first session of the second trial which began on July 8, 1963, or some two and one-half months after the first trial ended in a mis-trial (R. 1160, 4/25/63 Order, Blotter Entry), the defendant did not call Mrs. Tarlow to the witness stand. Nor did the defendant call Mrs. Tarlow to the witness stand at the second session of the second trial which began on August 15, 1963 after an adjournment at the close of the trial so that the defense might seek additional evidence (7/20/63 Tr. 1607; R. 1161, 7/19/63 Order, Blotter Entry). On these facts alone it is clear that proposed testimony by Mrs. Tarlow is not newly discovered evidence, but evidence, if it be such, that was clearly discoverable by the defendant, of all people, compounded by a complete absence of diligence, *Pitts v. United States*, 263 F. 2d 808, 810 (C.A. 9th). But the defendant went further—in a good illustration of the technique adopted by the defendant in a number of instances both below and here, e.g., the defendant's previously referred to treatment of the record in his motion to disqualify the trial judge; and the defendant's complaint (Defs. Br. p.

27) at the admission below of the depositions relied on in the defendant's motion for a new trial. (S.R. 31).

In this instance we have reference to the fact that in support of his motion for a new trial the defendant furnished the Court with extracts of a deposition the defendant took of Mrs. Tarlow (S.R. 58(a), 58(g)-58(j)). For rather apparent reasons, the defendant did not furnish the Court with other highly relevant and illuminating portions of the deposition. Thus, during the same deposition, Mrs. Tarlow testified that she was subpoenaed as a witness at the trial, responded to the defendant's subpoena, was interviewed by the defendant at the Court house, and then not called as a witness because the defendant, who was "practically hysterical," was not satisfied with her proposed testimony (Opposition to Motion for New Trial, Ex. A, S.R. 100-103; Tarlow Dep., Ex. H, pp. 54-57). It was in this fashion that the defendant brought himself squarely within the rule that, "One cannot speculate upon failure to call a witness and thereafter present such testimony as newly discovered", *Shibley v. United States*, 237 F. 2d 327, 332 (C.A. 9th).

The Doan—Mary Nevens Gift Certificate Transaction (Defs. Br. p. 56). In an argument that is incredible in the light of the record below and represents a complete switch of position (Defs. Br. p. 57, 1st paragraph; Gov. Br. in No. 19,539 pp. 55-56) the defendant would now supplement his scheming manipulations (described in the Government Brief in No. 19,539 at pages 35 through 45) by having this Court

grant him a new trial on the basis of a thoroughly litigated transaction in which the defendant was a highly active and imaginative participant throughout (e.g., Lenske, Vols. 37 pp. 54-72, 83-91, 148-149, Vol. 36 pp. 120-125), and specifically on the basis of an affidavit of Mrs. Doan (S.R. 15-18) who testified at the first trial where she said nothing about a loan to the defendant—mentioned for the first time in her affidavit. When cross-examined by the defendant Mrs. Doan was not even asked about an alleged loan (Vol. 18 pp. 161-181). And the defendant, who testified at length on his dealings with the Doans, never once mentioned on the witness stand a loan that the defendant would now ask this Court to both accept and stamp as new evidence (e.g., Lenske, Vol. 36 pp. 120-125, Vol. 37 pp. 54-60, 148-149). Significantly, whether for reasons similar to those in the Rebecca Tarlow incident, or otherwise, we do not know, the defendant did not call Mrs. Doan as a witness at the second trial.

We note that in her affidavit Mrs. Doan alleges that "in anticipation" of the trade of her property for the properties listed in the Nevens estate by the defendant, "we (Mr. & Mrs. Doan) conveyed our home property to Mrs. Nevens" (S.R. 16). In other words, a trade was still contemplated by the Doans at the time of the conveyance and Mrs. Doan was to receive property—not money—for her home property. But the record fact is that Mr. and Mrs. Doan conveyed their home property to Mary Nevens by a deed dated and signed on December 31, 1958 (Ex. 727, F. 213; Doan, Vol. 18 pp. 172-174) or on the same date that the

\$28,500 down payment check was received (Vol. 36, p. 123; 7/12/63 Tr. p. 852) which the defendant now contends was loaned to him by the Doans. In short, even on the Doan affidavit account, the Doans had no money coming because the trade was on and the Doans were to get property while the money was to go to Mary Nevens and thence to the defendant via gift certificates drafted by the defendant—also signed on the same day! (Vol. 37, pp. 67, 83, 88-89). Highly interesting in this connection and, incidentally, contrary to the position now taken by the defendant, is the defendant's own testimony at the trial that the trade was still on until "the check came for around thirty-six thousand some dollars." (Vol. 36, p. 122.) This was the second check and it was for \$36,143.25. It was also later, being a *January 7, 1959, check* (Ex. 2139, F. 213; Vol. 9, pp. 164-165).

Everything else aside, the fact remains that the defendant has never explained how an alleged loan that was never mentioned at the trial by either himself or Mrs. Doan, both of whom would have been acutely familiar with the existence of any such loan, qualifies as newly discovered evidence.

Swan Drive-In Theatre (Defs. Br. p. 9). This is another transaction that was thoroughly ventilated at the trial. It is also another transaction in which the defendant has sought to escape the consequences of his acts by utilizing Charles Slaney who had been previously convicted of a criminal charge (7/16/63 Tr. p. 1114) and was again convicted on February 2, 1965, on ten counts of Grand Larceny by means of "trick, device, and bunco and by false and fraudulent

representations," and sentenced to not more than fifteen years on each count, to run concurrently. (Certified Copy of Information, Judgment, and Sentence, S. R. 51-58). After failing to call Slaney as a witness at the trial, while admitting that he knew during the trial that Slaney had what the defendant categorized as "pertinent information", but that he did not call Slaney as a witness because it was his belief that if the Government failed to call Slaney the issue would be decided in his favor (4/21/64 Tr. pp. 2649-2650, *Shibley v. United States*, 237 F. 2d 327, 332 (C.A. 9th)), certiorari denied, 352 U.S. 873; after failing to even claim, until after the trial was over (*ibid*), that the \$5,000 deposit in question was Slaney money invested in the Swan Drive-In Theatre; after testifying at the trial that another \$2,500 represented the total Slaney investment in the Swan Drive-In Theatre (Lenske, 7/16/63 Tr. 1115-1116); after testifying on the same day (7/16/63 Tr. 1148-1489) that he didn't know what it related to when shown the May 1, 1958 deposit slip for the \$5,000 on which the notation was typed "\$5,000 on Charles W. Slaney in exchange for cash" and to which notation the defendant had added in writing, "Re Investments"—the identical language the defendant used, incidentally, on the \$500 check he gave Mary Nevens on the same morning Mrs. Nevens failed to respond to a subpoena (Vol. 12, pp. 8, 21, 48-56, 84-85); and after failing to present this claim following an adjournment granted at the conclusion of the trial at the request of the defense for additional time to seek new evidence, the defendant would now

have this Court label as newly discovered evidence the interestingly and carefully phrased affidavit of one Larson. As Larson put it (S.R. 23) the facts alleged in his affidavit were given to him by "Charles Slaney and Reuben Lenske," supplemented by a personal investigation of undesignated "surrounding circumstances" and unspecified "direct knowledge".

The Larson affidavit should be contrasted with Larson's testimony at the first trial where he was subpoenaed by the Government and testified that (1) he "only knew by reputation" who was supposed "to have purchased the Swan Drive-In Theatre, (2) that he had "nothing whatever to do" with the details of the purchase of the theatre, and (3) that he did not know who the purchasers were except that he thought he knew from what the defendant, "told me at that time" (Vol. 16 p. 67). As in similar instances, the defendant did not call Mr. Larson as a witness at the second trial, e.g., the affidavit of one Bennett (S.R. 19) who also testified at the first trial (Vol. 22, p. 120-122) and was neither examined by the defendant (Vol. 22, p. 122) on the \$2,500 Cimarron Insurance Co. check, (the disposition of which by the defendant is discussed in the Government's Brief in No. 19,539 at page 70) nor called by the defendant as a witness at the second trial.

Other Items Listed by the defendant. On the L. W. Taylor transaction (Defs. Br. p. 67) which was reflected on the Government Net Worth Statement introduced into evidence at the first trial on March 30, 1963 (Vol. 27 p. 62) and never under attack by the defendant at either trial, the defendant would classify

as newly discovered evidence matter which was known to the defendant in 1958 (S.R. 58C) and was at that time and continued to be a matter of public record (S.R. 58k, 58m-58n), *Fernandez v. United States*, 329 F. 2d. 899, 904 (C.A. 9th), certiorari denied 379 U. S. 832, *Thompson v. United States*, 188 F. 2d 652, 653 (C.A., D.C.). In the same category is the Aremel transaction (Defs. Br. p. 66) in support of which the defendant relies on the affidavit of one David Raffety who was not called as a witness by the defendant at the trial and whose affidavit states that he lived all of his life "in a suburb immediately contiguous to Portland" . . . "and that all times during the past five years I have been available for interviews." (S.R. 41). So also, the defendant's effort to impeach the testimony of one W. K. Royal (Defs. Br. 71) while of no significance as newly discovered evidence (*Gallegos v. United States*, 295 F. 2d. 879, 881 (C.A. 9th), certiorari denied, 368 U. S. 988), and hardly an answer to the overwhelming evidence on this transaction (Gov. Br., No. 19,539 pp. 56-58), is of interest because the defendant contends that Royal gave conflicting testimony when he was examined by the defendant in a state court proceeding on July 29, 1963 (S. R. 33). But this was well prior to the last session of the trial below which did not start until August 15, 1963—and the defendant did not call Royal as a witness. The A. L. Prater transaction (Defs. Br. p. 64) is also another transaction that was reflected on the Government Net Worth Statement admitted at the first trial (Vol. 27 p. 62) and never under attack at either trial. A. L. Prater testified at

the first trial (Vol. 7 pp. 12-47, 83-89), as did Mrs. Prater (*ibid* 47-81), where both were examined at length by the defendant, and neither mentioned a running account owed to them by the defendant which, if they had, would have been incredible in the light of their testimony. Neither was called as a witness at the second trial by the defendant.

This is the record on which the defendant would now have this Court hold that the Court below abused its discretion when it denied the defendant's motion for a new trial on the grounds of newly discovered evidence.

CONCLUSION

After over ten weeks of trial and in excess of three hundred and fifty witnesses, the defendant was convicted on the overwhelming evidence of his guilt. The defendant presented no newly discovered evidence in this, his second bid for a new trial, and it is respectfully submitted that the trial judge properly exercised his discretion in denying the defendant's motion for a new trial, and the order below should stand.

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Date: day of, 1966.

CHARLES J. ALEXANDER
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